

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

REGIONAL DEVELOPMENT
AUTHORITY OF CHARLESTON-
KANAWHA COUNTY, WEST VIRGINIA
METROPOLITAN REGION,

Plaintiff,

Civil Action No.

18-C-1565
Judge Webster

v.

COROTOMAN, INC., and JOHN H.
WELLFORD, III, INDIVIDUALLY.,

Defendants.

COMPLAINT

COMES NOW Regional Development Authority of Charleston-Kanawha County, West Virginia Metropolitan Region, and files this Complaint against Defendants and states the following in support:

PARTIES

1. Plaintiff, Regional Development Authority of Charleston-Kanawha County, West Virginia, Metropolitan Region ("Plaintiff" or "RDA") is a West Virginia public corporation established pursuant to West Virginia Code §§ 7-12-1 *et seq.* with its principal place of business in Charleston, West Virginia.

2. Defendant Corotoman, Inc. ("Corotoman"), is a West Virginia corporation with its principal place of business in Charleston, West Virginia, and develops real estate for business and/or residential purposes.

3. Defendant John H. Wellford ("Wellford"), III, is an individual who, at all times relevant, resided in Charleston, Kanawha County, West Virginia.

JURISDICTION AND VENUE

4. Pursuant to W. Va. Code § 51-2-2, this Honorable Court has original jurisdiction over this matter because Plaintiff seeks equitable relief and damages of an amount more than \$7,500.

5. The allegations and counts described more fully below arise from West Virginia common law and statutes. Further, the Defendants either reside in or primarily do business in Kanawha County, West Virginia. Therefore, subject matter jurisdiction is appropriately vested in this Court.

6. Venue is proper under W. Va. Code § 56-1-1 because all the allegations complained of herein arise from transactions and conduct committed by Defendants while residing and operating in Kanawha County, West Virginia.

FACTUAL ALLEGATIONS

7. Pursuant to W.Va. Code § 7-12-2, the RDA was created with the goal to:

“... promote, develop and advance the business prosperity and economic welfare of the municipality or county for which it is created, its citizens and its industrial complex; to encourage and assist through loans, investments or other business transactions in the locating of new business and industry within the municipality or county and to rehabilitate and assist existing businesses and industries therein ...”

8. That Defendant Corotoman, the developer of the Northgate Business Park, entered in the Commercial Lease to develop and construct office building at Northgate for Ticketmaster.

9. The relocation of a Ticketmaster call center to Kanawha County presented a significant opportunity for economic development and job growth. To that end, both the RDA and the City of Charleston sought to provide incentive for Ticketmaster to relocate to Kanawha County, West Virginia.

10. The RDA agreed to hold title to the premises and permit the same to be used by Ticketmaster as a means of providing an economic development incentive through the deferment of real property taxes. RDA entered into this arrangement because Corotoman ultimately agreed to reimburse the foregone real estate taxes upon conclusion of the lease term.

11. Likewise, the City of Charleston agreed to provide a \$400,000.00 grant towards the cost of the construction on said call center, which it would recoup overtime through the payment of B&O taxes.

12. At all times, it was agreed and understood that Corotoman was to perform all the duties of the Landlord of the premise. Indeed, RDA has had little to no contact with Ticketmaster during the term of the lease as well as two subsequent leases which were negotiated without its knowledge.

13. On or around January 14, 1999, Corotoman entered into a Commercial Lease with Ticketmaster LLC ("Ticketmaster"), for the lease of a parcel of land at Lot E-1 situated in NorthGate, City of Charleston, Kanawha County, West Virginia (the "Premises").

14. On or around May 13, 1999, First Community Bank ("Bank") committed to loan RDA \$410,000.00 for the purchase of the Premises.

15. On or around June 5, 1999, Plaintiff entered into a Loan Agreement with the West Virginia Water Development Authority ("WVWDA"), which was acting on behalf of the West Virginia Infrastructure and Jobs Development Council ("Infrastructure"), where WVWDA agreed to loan RDA Three Million Dollars (\$3,000,000) (the "Infrastructure Loan") pursuant to a Promissory Note for purchase of the Premises.

16. On or around July 23, 1999, Plaintiff and Corotoman, executed a "Real Estate Purchase Agreement Containing Reservations and Covenants" (hereinafter "REPA").

17. Pursuant to REPA, on or around August 5, 1999, Corotoman executed a deed transferring title to the Premises to RDA.

18. On or around August 5, 1999, Corotoman executed an Assignment of Lease, in which Corotoman assigned the January 14, 1999 Commercial Lease to RDA.

19. Also on or around August 5, 1999, RDA executed an Assignment of Rentals and Leases to WVWDA.

20. Under the REPA, Wellford agreed “to personally guarantee and adopt directly, jointly and severally as his own personal obligation, the obligations and duties of Corotoman” laid out in REPA.

21. Pursuant to the REPA, Corotoman and Wellford agreed to sell Plaintiff the Premises, and Plaintiff agreed to purchase the Premises.

22. Under the REPA, Corotoman and Wellford also agreed to continue “to strictly and timely perform all of the obligations of the Landlord in the Lease, and to pay all amounts payable by Landlord under the Lease.”

23. Corotoman and Wellford have failed to properly maintain the Premises as required under the Lease, including but not limited to repairs to the roof and HVAC system of the Ticketmaster building.

24. Further, the obligations Corotoman and Wellford agreed to perform under REPA include the exclusive right to collect rent from Ticketmaster.

25. The REPA requires that Corotoman and Wellford “promptly pay on behalf of RDA all amounts due on the Long Term Loans.”

26. In fact, Corotoman and Wellford were “authorized and directed to, and shall, perform all of the obligations of RDA under the Loan Agreements . . . by and between RDA and Infrastructure, and RDA and Bank, in connection with the Long Term Loans.”

27. Further, Corotoman and Wellford were “authorized and directed to, and shall, keep and maintain all of the covenants of RDA under each of the Deeds of Trust . . . and Assignments of Rents and Leases . . . executed in favor of Infrastructure and Bank in connection with the Long Term Loans.”

28. Pursuant to the REPA, Corotoman and Wellford “reserve[d] the prior and exclusive right at any time to repurchase the Premises and all the rights conveyed or transferred to RDA in connection therewith at any time, upon and in consideration of the (i) payment in full by Corotoman of the [Infrastructure] Loan, (ii) payment or assumption of the Bank Loan, and (iii) payment of foregone real estate taxes as set forth in paragraph 11 hereof.”

29. Further, Corotoman and Wellford are “obligat[Ed] to repurchase the Premises for the same consideration and on the same terms as set forth in” Paragraph 14 of this Complaint.

30. The REPA sets forth the calculation of foregone real estate taxes as being the lesser of either the amount of foregone real estate taxes as calculated by the Assessor of Kanawha County or “one half of the difference between (a) the fair market value of the Premises and (b) the sum of the payoff amount (principal amounts only) of the Long Term Loans, plus an amount equal to the total documented expenses of Corotoman in connection with the Lease not reimbursed by the Tenant under the Lease.”

31. Pursuant to the REPA, Corotoman and Wellford collected rent from Ticketmaster according to the terms of the Lease.

32. Corotoman and Wellford have failed to pay over \$1,561,000.87 of rent as they were required to under REPA.

33. The failure of Corotoman and Wellford to pay over the rent allowed interest to accumulate on the Infrastructure Loan.

34. Presently, the Infrastructure Loan has now accrued interest in the amount of \$333,018.31.

35. As a result, the Infrastructure Loan is in arrears in the amount of \$1,894,019.18.

BREACH OF CONTRACT -- ARREARAGE

36. Plaintiff realleges and incorporates herein all the allegations contained in the previous paragraphs.

37. As established above, a valid contract existed between Plaintiff and both Corotoman and Wellford when REPA was signed.

38. Corotoman and Wellford agreed to both act as Landlord under the Lease and pay over money to WVWDA on behalf of RDA.

39. Corotoman and Wellford breached REPA by failing to pay on behalf of RDA all amounts due on the Long Term Loans.

40. Corotoman and Wellford breached REPA by failing to perform all of RDA's obligations under the Loan Agreements between RDA and Infrastructure and RDA and Bank.

41. Corotoman and Wellford breached REPA by failing to maintain all of the covenants of RDA under each of the Deeds of Trust and Assignments of Rent and Leases.

42. Under West Virginia law, the "rule for damages as a result of a breach of contract is that recovery may be obtained for those damages which either arise naturally from the breach or may reasonably have been within the contemplation of the parties at the time they made the

contract.” *Desco Corp. v. Harry W. Trushel Const. Co.*, 186 W. Va. 430, 434, 413 S.E.2d 85, 89 (1991).

43. Corotoman and Wellford’s breach of contract resulted in damages in the amount of \$1,561,000.87, representing the total amount of money Corotoman and Wellford failed to pay over in violation of REPA.

44. Further, Corotoman and Wellford’s breach has resulted in additional damages in the amount of \$333,018.31, representing the amount of interest now owed on the Infrastructure Loan.

45. The interest which has accumulated on the Infrastructure Loan arises naturally from the breach of a contract to make loan payments on time.

46. Therefore, Plaintiff has suffered total damages equal to \$1,894,019.18.

BREACH OF CONTRACT – FOREGONE REAL ESTATE TAXES

47. Plaintiff realleges and incorporates herein all the allegations contained in the previous paragraphs.

48. Further, under the terms of the REPA, Corotoman and Wellford agreed to repurchase the property from RDA upon expiration or termination of the Lease.

49. Under the terms of the REPA, Corotoman and Wellford agreed to repay foregone real estate taxes on repurchase of the Premises.

50. Because repayment of foregone taxes was a requirement for Corotoman and Wellford’s repurchase of the property, and Corotoman and Wellford were obligated to repurchase, the foregone real estate taxes are damages that arise naturally from the breach of REPA.

51. The foregone real estate taxes are damages which were reasonably within the contemplation of the parties at the time REPA was made.

52. Because Corotoman and Wellford are now in breach of REPA, Plaintiff is entitled to receive the benefit of the bargain made.

53. Payment of the foregone real estate taxes was a benefit which RDA bargained for when the agreement was entered.

54. Therefore, RDA is entitled to receive the foregone real estate taxes calculated as REPA directs.

UNJUST ENRICHMENT

55. Plaintiff realleges and incorporates herein all the allegations contained in previous paragraphs.

56. RDA is alternatively entitled to relief under the doctrine of unjust enrichment.

57. Under West Virginia law, unjust enrichment is based upon equitable principles and is sometimes referred to as “restitution, a contract implied in law, quasi-contract, or an action in *assumpsit*,” but it is an action at law for which the remedy is money damages. *See Realmark Devs. Inc. v. Ranson*, 588 S.E.2d 150, 153 (W. Va. 2003).

58. An award for unjust enrichment is appropriate “if benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore, the law requires the party receiving the benefits to pay their reasonable value.” *Realmark Devs. Inc. v. Ranson*, 542 S.E.2d 880, 885 (W. Va. 2000).

59. RDA is entitled to relief under the theory of unjust enrichment.

60. Corotoman and Wellford have benefited from the arrangement with RDA because they have received rent from Ticketmaster.

61. Allowing Corotoman and Wellford to keep the rent collected from Ticketmaster would be inequitable and unconscionable.

DECLARATORY JUDGMENT

62. Plaintiff realleges and incorporates herein all the allegations contained in previous paragraphs.

63. Plaintiff seeks declaratory judgment from this Court pursuant to W. Va. Code §§ 55-13-1 *et seq.*

64. As established above, Corotoman and Wellford have breached the Real Estate Purchase Agreement.

65. On October 17, 2018, as a result of Corotoman and Wellford's breach, RDA has exercised its authority to terminate the Defendants rights under the REPA.

66. RDA requests that this Court enforce its rights under the REPA to for payment and collection of the Arrearage and any other sums owing by Corotoman and Wellford under the Agreement.

67. Further, RDA requests that this Court declare that Corotoman and Wellford are required to repair the roof and HVAC system or otherwise required to pay for the repair of the roof and HVAC system.

CONVERSION

68. Plaintiff realleges and incorporates herein all the allegations contained in the previous paragraphs.

69. Under West Virginia law, conversion is defined as "[a]ny distinct act of dominion wrongfully exerted over the property of another, and in denial of his rights, or inconsistent therewith, may be treated as conversion and it is not necessary that the wrongdoer apply the property to his own use. And when such conversion is proved the plaintiff is entitled to recover

irrespective of good or bad faith, care or negligence, knowledge or ignorance.” Syl. Pt. 17, *Rodgers v. Rodgers*, 184 W. Va. 82, 399 S.E.2d 664, 668 (1990).

70. Corotoman and Wellford collected rent from Ticketmaster on Plaintiff’s behalf in accordance with the REPA.

71. Pursuant to REPA, Corotoman and Wellford were obligated to pay over the rent collected to WVWDA to satisfy the Loan Agreement on RDA’s behalf.

72. However, Corotoman and Wellford wrongfully exerted dominion over RDA’s property when Defendants kept the rent payments from Ticketmaster without paying all amounts due on the Long Term Loans.

73. Corotoman and Wellford’s acts constitute a “tortious taking,” a “use or appropriation to the use of the defendant[s] indicating a claim of right in opposition to the rights of the owner,” or “a refusal to give up the possession to the owner on demand.” *See Tilhance Creek Investments, LLC v. BCBank, Inc.*, Civil Action No. 12-0290, 2013 WL 1286130, at *8 (W. Va. Mar. 29, 2013).

74. As such, Corotoman and Wellford have unlawfully converted Plaintiff’s property to their own use.

75. Therefore, Plaintiff is entitled to the value of the property which has been converted by Corotoman and Wellford, an amount equal to \$1,561,000.87.

PUNITIVE DAMAGES

76. Plaintiff realleges and incorporates herein all the allegations contained in the previous paragraphs.

77. West Virginia law allows punitive damages for breach of contract where the “breach of contract amounts to an independent and willful tort since the plaintiff has the right to

elect whether he will proceed in tort or upon contract.” *Warden v. Bank of Mingo*, 176 W. Va. 60, 65 n. 7, 341 S.E.2d 679, 684 n. 7 (1985).

78. Under West Virginia law, punitive damages are appropriate when “the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety, and welfare of others.” W. Va. Code § 55-7-29(a).

79. Corotoman and Wellford’s unlawful retention of rent collected from Ticketmaster along with their failure to pay interest on the Long Term Loans was done with actual malice towards RDA.

80. Further, “one of the infrequently encountered factors supporting an award of punitive damages [is] unprosecuted criminal conduct [.]” *McClung v. Marion County Comm’n*, 178 W. Va. 444, 452, 360 S.E.2d 221, 229 (1987) (citing *Wells v. Smith*, 171 W. Va. 97, 104–05, 297 S.E.2d 872, 879–90, *overruled on other grounds by* *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991)).

81. West Virginia law defines embezzlement as when “any agent, clerk or servant of any firm or person, or company or association of persons not incorporated, embezzles or fraudulently converts to his own use . . . money . . . of any other person, which shall have come into his possession, or been placed under his care or management, by virtue of his office, place or employment, he shall be guilty of the larceny thereof.” W. Va. Code § 60-3-20.

82. Under West Virginia law, the crime of embezzlement involves “(1) the trust relation of the person charged, and that he falls within that class of persons named; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession, or was placed in

the care, of the accused, under and by virtue of his office, place or employment; (5) that his manner of dealing with or disposing of the property, constituted a fraudulent conversion and an appropriation of the same to his own use; and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof.” *State v. Berry*, 239 W. Va. 226, 233, 800 S.E.2d 264, 271 (2017) (quoting Syl. Pt. 2, in part, *State v. Moyer*, 58 W. Va. 146, 52 S.E. 30 (1905)).

83. The provisions of REPA establish a trust relationship between Corotoman and RDA.

84. The rent money collected by Corotoman under REPA and the Lease, is property embraced by West Virginia’s embezzlement statute. *See* W. Va. Code § 61-3-20.

85. Per the August 5, 1999 Assignment of Lease, Corotoman assigned the Lease to RDA.

86. Therefore, the rent Corotoman collected from Ticketmaster is the property of RDA.

87. Corotoman came into possession of the rent from Ticketmaster under and by virtue of his agreement to act, on RDA’s behalf, as Landlord under the Lease.

88. Under REPA, Corotoman agreed it would pay over the money collected as rent to pay off the Long Term Loans.

89. Corotoman’s retention of the rent constitutes a fraudulent conversion and/or an appropriation of the rent to its own use.

90. Corotoman converted the rent from Ticketmaster with the intent to deprive RDA thereof.

91. Therefore, Corotoman and Wellford’s conduct constitutes a breach of W. Va. Code § 61-3-20, West Virginia’s code section on embezzlement.

92. To date, neither Corotoman nor Wellford has been charged with any crime, and therefore Corotoman and Wellford's conduct is "unprosecuted criminal conduct."

93. Therefore, an award of punitive damages is appropriate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays to this Court for the following relief:

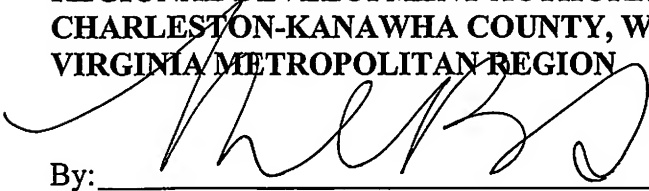
- (a) Damages in the amount of \$1,894,019.18, representing the present amount of the arrearage of the Infrastructure Loan;
- (b) Damages equal to the amount of foregone real estate taxes, as calculated under Paragraph 11 of the Real Estate Purchase Agreement;
- (c) Damages equal to the amount of money Defendants unlawfully converted to their own use;
- (d) Declaratory judgment that all Defendants' rights under the Real Estate Purchase Agreement are terminated;
- (e) Declaratory judgment that Defendants are required to repair the roof and HVAC system of the building, or are otherwise required to pay the cost of said repairs;
- (f) Punitive damages;
- (g) Attorney fees and costs related to this action;
- (h) All other damages provided by law; and
- (i) Any other relief that this Court deems equitable and just.

JURY TRIAL DEMAND

PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES SO TRIABLE.

[signature block on next page]

**REGIONAL DEVELOPMENT AUTHORITY OF
CHARLESTON-KANAWHA COUNTY, WEST
VIRGINIA METROPOLITAN REGION**

By:  _____
Of Counsel

Melissa Foster Bird, Esquire (WVSN 6588)
Alexander C. Frampton, Esquire (WVSN 13398)
NELSON MULLINS RILEY & SCARBOROUGH LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
(304) 526-3500

**Counsel for Regional Development Authority of Charleston-
Kanawha County, West Virginia Metropolitan Region**